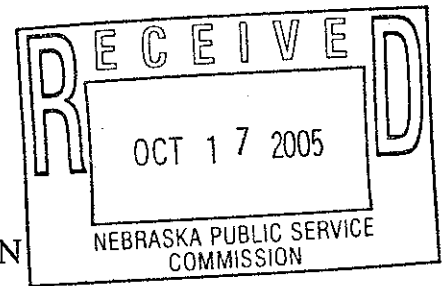


BEFORE THE
NEBRASKA PUBLIC SERVICE COMMISSION



In the Matter of the Application of) Case No. NG-0031
Aquila, Inc., d/b/a Aquila Networks) *xc: 10/18/05 RP*
(Aquila), Omaha, seeking authority) *Angela*
for Limited Cost Recovery in the) *Frank*
State of Nebraska) *Laura*

REPLY BRIEF OF THE PUBLIC ADVOCATE

On October 7, 2005, both Aquila, Inc., d/b/a Aquila Networks ("Aquila") and the Public Advocate filed their respective initial briefs in this docket. Pursuant to the Planning Conference Order entered herein on September 9, 2005, the Public Advocate submits this Reply Brief of the Public Advocate.

The State Natural Gas Regulation Act specifically provides procedures that must apply to general rate filings by jurisdictional utilities. Neb. Rev. Stat. §66-1838. Aquila has expressly acknowledged in both its August 1, 2005 Application in this docket and in its Initial Brief of Aquila herein that Aquila's Application is not intended to be a general rate filing within the meaning of Neb. Rev. Stat. §66-1838. Accordingly, and as noted in the Initial Brief of the Public Advocate, an initial threshold legal issue is presented in this case as to whether the State Natural Gas Regulation Act (the "Act") provides statutory authority to the Commission for the type of departure Aquila proposes from the general rate filing procedure provided for by the Act. The Public Advocate respectfully submits that this threshold legal issue must be resolved before any consideration of any purported policy reasons Aquila may advance in support of its limited cost recovery proceeding

proposal or before any consideration can be given to specifics of the types of costs that Aquila may propose to be addressed through a limited cost recovery procedure. If the Act does not permit the sort of limited cost recovery proceeding that Aquila proposes in its Application, it simply doesn't matter what public policy arguments may be advanced in favor of or in opposition to such a proceeding or what type and level of costs the utility may be suggesting it might seek to recover if such a proceeding were legally permissible. The Public Advocate is of the view that the Act simply does **not** authorize the initiation by a jurisdictional utility of a limited cost recovery proceeding. However, even if the Act had granted the Commission discretion to permit such a limited cost recovery proceeding, the Public Advocate believes that there are compelling public policy arguments as to why such a proceeding should not be permitted.

ARGUMENT

- I. UNDER THE STATE NATURAL GAS REGULATION ACT, A RATE PROCEEDING INITIATED BY A JURISDICTIONAL UTILITY THAT WOULD RESULT IN A CHANGE IN THE OVERALL REVENUE REQUIREMENTS OF THE UTILITY CAN ONLY OCCUR THROUGH A GENERAL RATE FILING PURSUANT TO NEB. REV. STAT. §66-1838.**

It is readily apparent that Aquila's Application would result in a substantial increase in Aquila's overall revenue requirements. In Exhibit 2-4 to Aquila's Application, Aquila requests an increase in its annual revenue requirements of \$1,057,936. Such a filing by a jurisdictional utility requesting such an increase is plainly a "filing which requests changes in overall revenue requirements for a jurisdictional

utility” within the meaning of Neb. Rev. Stat. §66-1802(6). In fact, Aquila further acknowledges in its Initial Brief that its proposed limited cost recovery proceeding would result in increases in revenues and a corresponding increase in the customer charge to all of Aquila’s jurisdictional customers in Nebraska. (For example, see the third point listed in the last bullet point on page 5 of Aquila’s Initial Brief, which acknowledges its “LCR application” would result in “increased rates.”) Thus, despite Aquila’s suggestion to the Commission that any other general provision of the Act may be read as supporting the concept of a limited cost recovery proceeding, the bottom line is that, because Aquila’s Limited Cost Recovery Application seeks changes in the overall revenue requirements of Aquila (and very substantial increases at that), such Application can only be considered as a general rate filing within the meaning of the Act. Because Aquila has gone to great lengths to specifically note that it does not regard its Application in this docket to be a general rate filing and that it does not wish the Commission to treat the Application as a general rate filing, it necessarily follows that Aquila’s Application is beyond the authority delegated to the Commission by the Act and cannot be granted.

The Natural Gas Regulation Act is not just a combination of various miscellaneous provisions, which parties are free to construe in isolation. Rather, the Act sets forth an integrated approach to regulation of jurisdictional natural gas utilities. The various sections of the Act were intended to work together to achieve the very worthy goal of having truly meaningful centralized regulation of jurisdictional utilities and the rates charged by such utilities.

The Legislature wisely recognized that there are two distinct categories of changes that might be proposed to utility rates and/or terms of service – (1) Those changes that **would not** result in any changes the jurisdictional utility’s overall revenue requirements (i.e., that are revenue neutral); and (2) those changes that **would** result in changes in the utility’s overall revenue requirements. If a proposed change in some aspect of rates or any term or condition of service pertaining to the service or rates of a jurisdictional utility will **not** result in any change in the overall revenue requirements of the utility, the procedure set forth in Neb. Rev. Stat. §66-1808 applies.

Notably, the first subsection of §66-1808 specifically provides that the provisions of §66-1808 “do not apply to general rate filings.” Thus, the provisions of §66-1808 do not apply to filings that will **not** result in any change in the overall revenue requirements of the jurisdictional utility. However, if a filing “requests changes in overall revenue requirements of a jurisdictional utility,” see §66-1802(6), then §66-1808 has no application – “general rate filings” as defined in §66-1802(6) are **only** authorized by and **must** follow the requirements and procedures set forth in §66-1838.

If Aquila were simply proposing a change in a term or condition of service that will not change the overall revenue requirements the utility recovers from jurisdictional customers, the ability to offer a special rate that will not change the overall revenue requirements the utility recovers from jurisdictional customers (such as Aquila’s recently approved economic incentive rate tariff – see NG-0007.1) or a shift in rate design that is revenue neutral in the sense that it will not change the overall revenue requirements of

the utility, the procedures set forth in §66-1808 apply. On the other hand, if a jurisdictional utility makes a filing that requests any “changes in overall revenue requirements for a jurisdictional utility,” such a filing is, by definition under the provisions of §66-1802(6) a “general rate filing” and the procedures and requirements of §66-1838 apply and must be followed. A filing which requests changes in overall revenue requirements for a jurisdictional utility not only deserves, but requires, the type of detailed scrutiny and consideration of all pertinent information provided by the general rate filing procedures. Only filings requesting changes in rates or terms or conditions of service that will not result in changes in overall revenue requirements qualify for the more limited and expedited review provided for in §66-1808.

In its Initial Brief, Aquila has gone to great pains to argue that §66-1838 only applies to general rate filings and that other provisions of the Act should be viewed as permitting a procedure such as the so-called limited cost recovery proceeding that Aquila is proposing. However, as should be abundantly clear, the Act cannot and should not be construed to provide that a utility, simply by intoning an incantation that its filing is not a general rate filing, can seek relief for what is a general rate filing without complying with the Act’s specific requirements applicable to general rate filings.

Aquila also asserts in its Initial Brief that §66-1855 constitutes a broad grant to the Commission of the power to permit “alternative rate filings.” However, Aquila’s argument misses the mark for several reasons. First, as already noted in the Initial Brief of the Public Advocate, Aquila’s proposed limited cost recovery most certainly does not

fall within any of specific alternative rate mechanisms recognized in §66-1855 – it is not a request for “banded rates,” it is not a request for “determination of rates by negotiation,” and it is not a request for any type of “customer choice and other programs to be offered by a natural gas public utility to unbundle one or more elements of the service provided by the utility.” Aquila seeks to focus on the language “including, but not limited to” appearing in §66-1855 as an exception it suggests can be expanded to permit a limited cost recovery proceeding. However, as noted above, Aquila’s Limited Cost Recovery Application is, by definition, a “general rate filing” within the meaning of §66-1802(6). Thus, Aquila’s argument amounts to a claim that the clear statutory definition of “general rate filing” set forth in §66-1802(6) and the specific procedures the Act requires for general rate filings in §66-1838 can simply be ignored. This would obviously thwart the clear mandate of the Legislature. Until and unless the Legislature changes the provisions of the Act, the Act simply does not permit a “general rate filing” to be considered and approved by this Commission unless the jurisdictional utility complies fully with all filing requirements applicable to general rate filings and unless the procedures provided by §66-1838 are followed.

Aquila asserts at page 5 of its Initial Brief that “Aquila’s LCR filing is intended as an alternative rate making filing, and is consistent with general regulatory principles.” However, general regulatory principles applicable to filings that request changes in overall revenue requirements require that such filings be carefully reviewed through the time-honored and established general rate case procedure. Such general regulatory

overall revenue requirements require that such filings be carefully reviewed through the time-honored and established general rate case procedure. Such general regulatory principles are specifically recognized in the Act's definitional provisions that establish that any filing that requests changes in the overall revenue requirements of a jurisdictional utility is a "general rate filing" within the meaning of §66-1802(6) and must be addressed through the specific procedures applicable to general rate filings as set forth in §66-1838.

Aquila's Initial Brief makes reference to the term "full blown rate proceeding" (see fourth sentence of first bullet point at page 5 of Aquila's Initial Brief). However, the term "full blown rate proceeding" does not appear in the Act. It appears that Aquila uses this term as an argument device to suggest that, because general rate cases are necessarily involved, time-consuming and expensive, some alternative must necessarily exist. However, the Public Advocate respectfully submits that a "general rate filing" as that term is defined in §66-1802(6) is one thing and that a proposed change in rates or terms or conditions of service that does not request changes in a jurisdictional utility's overall revenue requirements is another. If Aquila wishes to try to cast a negative connotation on general rate filings by referring to such proceedings as "full blown rate proceedings," it can do so. However, this in no way alters the fundamental legal analysis that must be addressed on a threshold level – namely, can Aquila's Application even be entertained outside of the context of a general rate filing? The Public Advocate submits that the answer to this question is a resounding, "No."

procedure as proposed by Aquila in its Application. Two points refute this assertion – First, construing §66-1855 to permit a limited cost recovery procedure of the sort proposed by Aquila would effectively repeal the “general rate filing” definition and procedures provided for in §66-1802(6) and §66-1838. It is extremely doubtful that jurisdictional utilities will be willing to submit themselves to the full scrutiny of all pertinent data that is inherent in making a general rate filing if they have the option of recovering millions of dollars of increased revenues through the alternate route of a more limited proceeding such as the proposed limited cost recovery procedure, which would look only at questions of whether the utility’s revenue requirements should be increased in isolated and specific categories of costs.

The Public Advocate has received a copy of a September 14, 2005 letter from Senator Chris Beutler to Mr. Steve Pella, Vice President of Aquila Nebraska Operations. Although the Public Advocate had no role in the preparation of Senator Beutler’s letter, the Public Advocate believes that it underscores the view that the State Natural Gas Regulation Act does not authorize a proceeding that requests changes in the overall revenue requirements of the jurisdictional utility other than through the vehicle of a general rate filing. Senator Beutler notes that he finds “no authority in the State Natural Gas Regulation Act to support this action [Aquila’s Limited Cost Recovery Application]” and that the decision whether to create a limited cost recovery alternative to a general rate filing “properly lies within the jurisdiction of the Legislature,” which Senator Beutler

goes on to indicate he believes to be “the only body endowed with the authority to change existing statutory procedures.”

II. AQUILA’S APPLICATION FOR A “LIMITED COST RECOVERY” PROCEEDING IS CONTRARY TO PUBLIC POLICY.

As noted in the Public Advocates Initial Brief, the very reason that the State Natural Gas Regulation Act provides for the detailed procedures and the related protections involved in general rate filings is to ensure that no “cherry picking” of issues occurs in cases in which a jurisdictional utility seeks an increase in its revenue requirements. Simply looking at selected costs that may have increased since the time an initial rate tariff was filed with the Commission or a revised tariff was established through the general rate filing procedure is simply not adequate to fairly determine whether a jurisdictional utility’s revenue requirements should be increased. To perform this task properly, it is necessary to conduct a detailed review of all costs – including those costs that have increased and those costs that have decreased.

As noted in the preceding section of this brief, the statutory language of the State Natural Gas Regulation Act simply does not permit the Commission to consider a request for a rate change that involves a change in the overall revenue requirements of a jurisdictional utility other than through the “general rate filing” procedures provided for by the Act. This being the case, it simply doesn’t matter how compelling of a reason or set of reasons Aquila may advance from a policy standpoint as to how Aquila contends it

would be better if rates could be determined through the proposed limited cost recovery proceeding proposed in Aquila's Application. However, recognizing that Aquila has devoted a substantial part of its Application to such policy arguments, it is appropriate for the Public Advocate to point out that the procedure proposed in Aquila's Application is actually contrary to public policy.

The Public Advocate respectfully refers the Commission to the policy arguments set forth in its Initial Brief. In addition, the Public Advocate will address Aquila's argument that it should be permitted to use a limited cost recovery procedure, even though such a procedure will admittedly result in a substantial increase in Aquila's overall revenue requirements, due to what Aquila perceives as its need to compete with the Metropolitan Utilities District ("MUD"). Even if it is true that Aquila must compete with MUD at some level, this fact is of no legal significance in this case and certainly cannot alter the answer to the question of whether the Act can permit a utility to seek an increase in its revenue requirements outside of the context of a general rate filing. However, on a policy level, it makes little sense to alter the way jurisdictional utilities are permitted to function simply because one jurisdictional utility perceives itself as having a need to compete with a publicly-owned utility. Among the primary reasons why regulation is necessary for an investor-owned natural gas utility is to temper the monopoly power granted to that utility by protecting ratepayers from potential overreaching. In theory, a publicly-owned utility does not present the same concerns, as

it is not responsible to report a profit to shareholder/investors and its governing body members are accountable to the public through the electoral process.

Aquila refers to various rate design tools that are used in other jurisdictions at page 9 -14 as somehow providing support for its request to pursue a limited cost recovery procedure. However, none of these matters involve an increase in the overall revenue requirements of the jurisdictional utility from what was demonstrated in the last rate case or what existed at the time of the adoption of the most recent rate schedule. Simply stated, these concepts do not support the adoption of a limited cost recovery procedure.

CONCLUSION

For all of the foregoing reasons, the Public Advocate respectfully submits that Aquila's Application should be denied.

DATED this 17th day of October, 2005.

ROGER P. COX, Public Advocate,
Formal Intervener

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One of Intervener's Attorneys

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served by e-mail and by U.S. mail, sufficient postage prepaid this 17th day of October, 2005 upon Aquila, Inc. d/b/a Aquila Networks by serving same upon the following representatives of Aquila:

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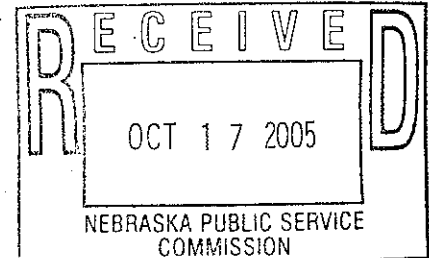


COMMITTEES

Chairperson - Legislative Performance Audit
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 Executive Board
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 Reference

September 14, 2005

Mr. Steve Pella
 Vice President, Aquila Nebraska Operations
 1815 Capitol Avenue
 Omaha, NE 68102



Re: Aquila "Limited Cost Recovery" Application

Dear Mr. Pella,

I write in response to Aquila's August 1, 2005, filing of a "Limited Cost Recovery" application (hereinafter LCR) with the Nebraska Public Service Commission (hereinafter PSC). Through this self-styled LCR, Aquila seeks "to establish an alternative mechanism for recovery of legitimate utility costs associated with the provision of natural gas jurisdictional utility service within the State of Nebraska," (Aquila Application at 1). Aquila requests \$1,057,936, an increase that would result in an additional cost of approximately \$.50 per month per natural gas consumer (Aquila Application at 4). I find no authority in the State Natural Gas Regulation Act to support this action, and I respectfully request that Aquila withdraw its application.

The State Natural Gas Regulation Act (hereinafter the Act), NEB. REV. STAT. §§ 66-1801 to 66-1857 (2003), clearly sets forth the requirements of a general rate filing as the sole means for jurisdictional utility providers to recoup costs. Section 66-1802 (6) defines general rate filing as "any filing which requests changes in overall revenue requirements for a jurisdictional utility" (emphasis added). Aquila's LCR is defined as an "increase in annual revenue," (Aquila Application at 1). There is, quite simply, no such action to change revenue requirements (labeled a LCR or otherwise) that is contemplated by the statutes other than a general rate filing. The creation of an alternative to this statutorily prescribed procedure properly lies within the jurisdiction of the Legislature.

Aquila's participation in a general rate case in 2003 puts it in a unique position to suggest changes to the Act that could make the recovery of utility costs more effective. However, because I believe that the Legislature is the only body endowed with the authority to change existing statutory procedures, I offer to Aquila my assistance to amend the Act to accommodate a more streamlined approach to cost recovery. I would be happy to introduce a bill in the next legislative session to achieve some of the positive effects that

Aquila suggests may be achieved through its LCR application, namely (1) smaller consumer rate increases, (2) lower regulatory and litigation costs, (3) more timely recovery of costs, (4) more limited general rate filings, and (5) increased competition, (Aquila Application at 4). This, I believe, is the proper starting point to begin to discuss an alternative mechanism for recovery of legitimate utility costs.

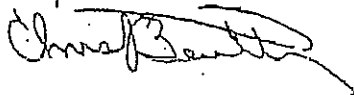
Aquila's offer of four very different indices as potential benchmarks that could be utilized in limited rate cases underscores the fact that because the Legislature has not explicitly authorized limited rate cases, the PSC has not yet been charged with employing its established procedures to create rules and standards for such cases. Were the Legislature to authorize a limited cost recovery process through statute, this lack of applicable policy would be remedied through the PSC's rulemaking process. Aquila suggests that the PSC proceed with its LCR on a "pilot basis" with limited discovery to be followed only at a later date by a rulemaking proceeding, (Aquila Application at 12). This approach would necessarily be rushed rather than reasoned, and I do not believe that such action could offer the same standard of care and protection to consumers that would be afforded by regular rulemaking proceedings held to implement new statutory language.

Aquila's application for increased revenue comes just two years after its general rate filing in which Aquila was awarded \$6,200,000. It also comes at a time of soaring gasoline prices and natural gas prices that are expected to increase by as much as 70 percent this winter (ENERGY INFO. ADMIN., U.S. DEP'T OF ENERGY, SHORT-TERM ENERGY OUTLOOK) (Sept. 7, 2005).

I do not believe this is the time to increase rates paid by consumers. Neither is it the time to eschew the rulemaking process of the PSC or to attempt to subvert the will of the Legislature by grafting new statutory language onto existing statutes. In short, it is simply not the time for a regulated entity to create its own rules. It is difficult for me to characterize any attempt to do so as anything but presumptuous; I do hope that Aquila's actions are instead merely misguided.

I look forward to your response in the hope that we may work together to find an appropriate means to resolve this situation, and, if possible, I would appreciate a response within ten days.

Sincerely yours,



Chris Beutler